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In the Supreme Court of the United States

No. 850

..... TERM, 196....

ROBERT G. FUNSETH,

Petitioner,

vs.

GREAT NORTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Ninth Circuit

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To the United States Court of Appeals
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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on Sept. 12, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the 9th Circuit, printed in the Appendix at page 15 is reported in 399 F.Rep.2d 918.

JURISDICTION

The case was decided by the Court of Appeals on September 12, 1968, and the opinion of the Court was filed on the same date. Jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Did the trial judge commit error prejudicial to the plaintiff, a railroad employee claiming damages by reason of his employer's violation of the Federal Employers' Liability Act, by defining legal causation in his charge to the jury in terms of the common law standard of proximate cause?

2. Assuming that the answer to the preceding question is in the affirmative, was the error rendered harmless by the fact that during the charge the trial judge employed language of legal causation incorporated in 28 U.S.C.A. §51?

3. How should a trial judge instruct the jury in order that the rule laid down in *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957) be implemented?

4. Is there a substantial conflict among the circuits in the interpretation and implementation in the rule of *Rogers v. Missouri Pacific Railway Co., supra?*

STATUTES INVOLVED

The statutory provision involved is 45 U.S.C. §51, as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

On the 7th day of February, 1966, Robert G. Funseth, the petitioner, while employed as a brakeman for respondent, Great Northern Railway Company, was called upon to line a switch in the East Hillyard yard of defendant at Spokane, Washington. While attempting to throw the switch, it stuck and petitioner was required to and did exert unusual force and power to line it. As a result thereof, he sustained a herniated intervertebral disc in the low back area. Petitioner was rendered physically incapacitated to perform his duties as a brakeman and subsequently was hospitalized and underwent surgery to remove the disc and fuse the vertebrae at the site of the herniation. Petitioner was unable to engage in gainful employment for a period of approximately nine months and alleged a wage loss of approximately $8,550.00.

At the close of all the evidence, counsel for the respondent submitted in writing the following request to charge the jury (Defendant's Requested Instruction No. 19):

> "Any party claiming negligence or contributory negligence has the burden of proving, by preponderance of the evidence, that the other party was negligent in some one of the particulars claimed and that such negligence was a proximate cause of the injury and damage claimed. The term 'proximate cause' means that cause which in a direct, unbroken sequence produces

the injury complained of and without which such injury would not have happened."

The trial judge instructed the jury as follows:

"A party is not entitled to recover solely because there has been an accident. Any party claiming negligence or contributory negligence has the burden of proving by a preponderance of the evidence, that the other party was negligent in some one of the particulars claimed, and that such negligence was a proximate cause of the injury and damage to plaintiff claimed.

The term 'proximate cause' means that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened."

The trial judge also instructed the jury as follows:

"An injury or damage is proximately caused by an act, or failure to act under the Federal Employers' Liability Act, whenever it appears, from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about, or actually causing the injury or damage. So, if you should find, from the evidence in the case, that any negligence of the defendant contributed, in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission.

The primary inquiry for you to decide in this case is whether you draw the conclusion that negligence of the railroad employer played any part in bringing about the injury to plaintiff. If you find that any carelessness or negligence

> on the part of the railroad, or of any employee of the railroad other than the plaintiff, in any way caused or contributed even in the slightest degree to the injury or injuries complained of, then your verdict should be for the plaintiff. Similarly, if you should find, from the evidence in the case that any negligence of the plaintiff contributed in any way or manner toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the plaintiff's act or omission, and plaintiff's recovery will be reduced accordingly as hereinafter explained."

At the conclusion of the entire charge, counsel for the plaintiff took exception to the Court's submission of the issue of proximate cause in the common law sense and called to the attention of the trial judge that under the rule of *Rogers v. Missouri Pacific Railway Co., supra* and *Page v. St. Louis Southwestern R. Co.*, 312 F.2d 84 (5th Cir. 1963), 98 A.L.R.2d 639, proximate cause as defined under the common law is no longer a part of the Federal Employers' Liability Act, and it is error to so instruct.

REASON FOR GRANTING THE WRIT

The question presented is of importance in the administration of the Federal Employers' Liability Act and was decided by the court below in a manner so as to conflict with the applicable decisions of this court.

The Circuit Court stated the question substantially as follows: In an FELA case, do the decisions of *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1948) and *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957) render an instruction — that tells the jury that the cause must be a proximate cause, i.e., "a cause which in a direct, unbroken sequence produces the injury and without which the injury would not have occurred" produce prejudicial error. The Circuit Court in its opinion concludes that the giving of this instruction is not prejudicially erroneous. The Circuit Court, however, did say in concluding its opinion:

> "However, just as in *Page* and *Parker*, so we in this case neither make any wholesale condemnation of the use of a traditional proximate cause instruction in F.E.L.A. cases nor do we necessarily recommend instructions in the particular form here given."

As we understand the Court's reasoning, the Court felt that the giving of both the classic common law definition of proximate cause and the definition of causation as suggested by *Rogers* rendered harmless any error which might have otherwise existed.

Prior to the entry of the decision by the Circuit Court of this case, an opinion in the Court of Appeals of the State of California, 2d Appellate District, Division Five in the case of *Garold D. Parker, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Company* contained the following expression:

> "The Court erred in giving the standard proximate cause instruction applicable to common law negligence actions. The common law concept of proximate cause as expressed in BAJI No. 104 has not been adopted as the causation test in F.E.L.A. cases. Causation in an F.E.L.A. case exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury. (*Rogers v. Missouri Pac. R. R. Co., supra,* 352 U.S. 500, 506; *Carter v. Atlanta & St. Andrews Bay Railway Co.* (1949) 338 U.S. 430, 434-435; *Hoyt v. Central Railroad* (3 Cir. 1957) 243 F. 2d 840, 842-843; *DeLima v. Trinidad Corp.* (2 Cir. 1962) 302 F.2d 585, 587-588 (Jones Act Case); *cf. Byler v. Wabash Railway Co.* (8 Cir. 1952) 196 F.2d 9, cert. den. (1952) 344 U.S. 826.) It is almost impossible to frame a definition of causation for F.E.L.A. cases encompassing all of the federal explanations of the term because the federal decisions cannot themselves be fully harmonized on the subject. (*Waller v. Southern Pacific Co.* (1967) 66 Cal. 2d 201, 212; compare *Bertrand v. Southern Pac. Co.* (9 Cir. 1960) 282 F.2d 569, 573, cert. den. 1961, 365 U.S. 816, with *Hoyt v. Central Railroad, supra,* 243 F.2d at 842-843, and *Iannacito v. Denver & Rio Grande Western Railroad* (10 Cir. 1967) 380 F.2d 1019, 1020-1021.) However, the plaintiff in an F.E.L.A.

> case is entitled to an instruction on causation which best connotes the controlling spirit of *Rogers*, and BAJI No. 104 falls substantially short of conveying the *Rogers* message. Although the burden upon the plaintiff in proving causation in an F.E.L.A. case can be weighed neither in pounds nor ounces, it is a substantially lighter burden than that imposed upon him by BAJI No. 104."

BAJI Instruction No. 104, which was then under consideration by the California Appellate Court, reads as follows:

> "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies."

The California Court also said:

> "*Rogers* means more than an exposition of the components which compel submission of the causation issue to a jury. If *Bertrand* is authority to the contrary, it is out of line with decisions squarely on the point in the second, third and fifth circuits, and it is also out of harmony with the precise mandate of Congress in using the language that the employer is liable for injuries sustained by his employee, 'for such injury or death resulting in whole or in part from the negligence' of the employer. (F.E.L.A., 45 U.S.C.A §51) The terminology

"in whole or in part" is not the language of common law proximate cause, as the Supreme Court in *Rogers* emphasized.

The final question is whether the refusal of plaintiff's instruction in this case was prejudicial. The defendant urges that it was not prejudicial because (1) there was no real issue about causation in this case; (2) plaintiff's counsel in argument before the jury said that plaintiff could recover if plaintiff's injuries were caused even in the slightest degree by the defendant's negligence; (3) defense counsel did not argue the question; (4) plaintiff testified without contradiction what caused the accident; and (5) the jury was given an instruction quoting the Act, using the words, 'in whole or in part.'

We dismiss at once the defendant's contention that counsel's arguments to the jury can cure an error in the court's instructions. The arguments of counsel are not a substitute for instructions by the court. Equally untenable is the contention that there was no issue concerning causation. The issue was raised by the pleadings and preserved by the pretrial order. Defendant itself submitted the proximate cause instruction, which the court gave, and the court also instructed the jury that causation was in issue in instructing the jury about each party's burden of proof. Defendant does not explain how prejudice could not result from the erroneous causation instruction from the fact that the plaintiff's testimony about how the first accident happened was uncontradicted. We cannot do so either. The final contention is that the error was cured because the trial court instructed the jury that the plaintiff was entitled to recover if his injury 'results in whole or in

> part from the negligence' of the defendent.[2] We do not think that the quotation from the Federal Employers' Liability Act adequately conveys the meaning of causation articulated by *Rogers*. The words 'or in part' are submerged in a barrage of detailed prose, and to assume that the jury would have grasped the significance of those three words and should further have recognized that the words were an explanation of proximate cause as expressed in BAJI No. 104 attributes unreasonable powers of perception to the jury."

The rule enunciated by the Circuit Court effectively undermines this Court's holding in *Rogers v. Missouri Pacific Railway Co., supra.* A jury of laymen instructed on the law of causation in diametrically opposed language is bound to be confused, to deny the existence of prejudicial error in the face of diametrically antagonistic instructions on the same subject presumes an ability on the part of jurors to discern and dismiss the inconsistencies and to select in their deliberations the proper rule. This is not the

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[2] "The Federal law which concerns us in this trial provides that a common carrier by railroad, such as the defendant here, shall be liable in damages to any employee who suffers injury when he is engaged in the duties of his employment, which injury results in whole or in part from the negligence of any of the officers or agents or of any employee of such carrier, except solely from the negligence of the one so injured, or which results by reason of any defect or insufficiency, due to the carrier's negligence, in its machinery or other equipment. If all the factors mentioned as creating such liability existed, the fact, if it is a fact, that the employee, himself, was guilty of contributory negligence shall not be a total bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The application of this rule shortly will be explained."

first example of some of the lesser courts of the nation seeking to do indirectly that which this honorable court has admonished them not to do, directly or indirectly.

CONCLUSION

It is the contention of petitioner that the charge as a whole was confusing, erroneous and prejudicial. Proximate cause was defined in the classical common law sense and again in a different part of the instructions in a completely different sense. Like the *Parker* case, the evidence of the defendant's negligence was not overpowering and a little mistake in the weighing of evidence relating to the defendant's negligence renders it probable that the jury cast its doubt in defendant's favor. If the holdings of this court in such cases as *Lavender v. Kurn,* 327 U.S. 645 (1946), *Coray v. Southern Pacific Co.,* 335 U.S. 520 (1949) and *Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500 (1957) have significance, they must be implemented in the trial of the case where philosophical ideals become practical realities.

With all the great pronouncements this Court has made in the last two decades broadening the scope of protection for the railroad employee under the Federal Employers' Liability Act, what benefits are in fact derived by the railroad men if the trial courts directly or indirectly ignore the holdings of this Court and declare the adherence to the abandoned rules as harmless error. This Court should once and for all presently resolve the conflict among the circuits in the application of the rule of causation in a F.E.L.A. case and make a specific pronouncement which will require the trial courts to bring the rule into the

courtroom so that the rule becomes a reality as well as an ideal.

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Carlton R. Reiter
Reiter, Day, Wall & Bricker

APPENDIX

FOR THE NINTH CIRCUIT
UNITED STATES COURT OF APPEALS

Robert G. Funseth,
Appellant,
vs.
Great Northern Railway Company,
Appellee.
No. 21,793

[September 12, 1968]

Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division

Before: BARNES and CARTER, Circuit Judges, and SWEIGERT, District Judge*

SWEIGERT, District Judge:

This is an action for damages, brought under the Federal Employers' Liability Act, 45 U.S.C. §51, et seq., by appellant, a railroad brakeman-conductor, against his employer, Great Northern Railway Company, for on-duty injuries sustained by appellant plaintiff and appellant appeals from the judgment entered against plaintiff upon a jury verdict in favor of defendant railroad

* WILLIAM T. SWEIGERT, United States District Judge for the Northern District of California, sitting by designation.

The FE.L.A. 45 U.S.C. §51, provides:

> "Every common carrier by railroad while engaging in commerce . . . shall be *liable* in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . *resulting in whole or in part from the negligence* of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." (emphasis ours)

The main question presented on this appeal is whether the District Court committed prejudicial error in giving to the jury the following instruction:

> " . . . The term 'proximate cause' means that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened. . . ." (Clerk's Tr. p. 107, lines 1-3)

Plaintiff-appellant, contending that the District Court committed prejudicial error in giving this instruction, mainly relies on *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1948); *Rogers v. Missouri Pacific Ry. Co.*, 352 U.S. 500 (1957) and *Page v. St. Louis Southwestern Ry. Co.*, 312 F.2d 84 (5th Cir. 1963).

Defendant-appellee, contending that the instructions on the subject of causation must be considered as a whole, argues that the particular instruction complained of is neither erroneous nor inconsistent with

the accompanying other instructions which express the liberal rule of causation indicated by the Supreme Court in the *Rogers* case, *supra*.

The instruction in question was given by the trial court in context with other instructions on the subject of causation. The whole instruction on the subject was as follows:

> "A party is not entitled to recover solely because there has been an accident. Any party claiming negligence or contributory negligence has the burden of proving by a preponderance of the evidence that the other party was negligent in some of the particulars claimed and that such negligence was a proximate cause of the injury and damage to plaintiff claimed.
> *"The term 'proximate cause' means that cause which in a direct, unbroken sequence produces the injury and without which such injury would* not have happened . . . (emphasis ours)
> "The Federal Employees Liability Act, §51 provides in part, 'Every common carrier by railroad while engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury or death resulting in whole or in part from the negligence of any of the officers . . . (Clerk's Tri. p. 109)
>
> "An injury or damage is proximately cause (sic) by an act, or failure to act, whenever it appears from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing, the injury or damage. So, if you should find, from the evidence in the case

> that any negligence of the defendant contributed in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission. (Clark's Tri. p. 110, lines 5-14).
>
> "The primary inquiry for you to decide in this case is whether you draw the conclusion that negligence of the railroad employer played any part in bringing about the injury to plaintiff. If you find that any carelessness or negligence on the part of the railroad, or of any employee of the railroad other than the plaintiff, in any way caused or contributed even in the slightest degree to the injury or injuries complained of, then your verdict should be for the plaintiff". (Clerk's Tr. p. 110, lines 15-23).

The particular instruction complained of, together with the matter preceding it, was requested by defendant-appellee. Defendant-appellee also requested the material cited supra to Clerk's Tri. p. 110, lines 5-14.

The remainder of the instruction, cited supra to Clerk's Tr. p. 110, lines 15-23, was requested by the plaintiff-appellant.

Both parties requested the giving of F.E.L.A. §51, which uses the language "resulting in whole or in part from".

Both parties also used the term "proximate cause" and "cause" in their various requested instructions, e.g., Plaintiff's Requested Instruction No.

11, using the term "proximately caused", and Plaintiff's Requested Instruction No. 8, using the word "caused".

Before instructing the jury the trial judge consulted with both counsel in chambers and informally reviewed their requested instructions. Counsel for plaintiff-appellant called to the court's attention as objectionable, Defendant's Requested Instruction No. 19 wherein the complained-of instruction appears.

The record alsc shows that at the conclusion of the instructions and during a jury recess, counsel for plaintiff-appellant, after twice assuring the court that he had no exceptions to the instructions as given, spoke up, saying:

> "I think I had better retract that statement . . . Your Honor, at this time he plaintiff excepts to the court's submitting to the jury and instructing them on the subject of proximate cause, because under the Rogers rule, in the Page case, Page v. Southwestern Railroad, in the recent trend of cases, it is my understanding that proximate cause is no longer a part of the Federal Employees' Liability Act . . . Your Honor said: 'The term "proximate" cause means that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened'. I submit, your Honor, that that was error. Later on, in the court's instructions to the jury, the court told them that the negligence of the plaintiff must proximately cause the injury, so I am taking exception to that . . . "

Defendant-appellee concedes that this is a F.E.L.A. case where, on disputed facts, the jury could have found for plaintiff but did not.

Neither *Coray v. Southern Pacific Co.*, nor *Rogers v. Missouri Ry.*, strongly relied on by plaintiff-appellant herein, involved instructions concerning the causation required to establish legal liability of a railroad under the F.E.L.A. Both cases dealt with evidentiary situations.

In *Coray v. Southern Pacific Company*, 335 U.S. 520 (1949) a Utah trial court had directed a verdict for defendant in a Federal Safety Appliance Act case. The Utah State Supreme Court affirmed. The U.S. Supreme Court granted certiorari and reversed upon the ground that decedent was entitled to recovery if a defective appliance was either the sole or a contributory cause of his death and that upon the evidence in the case the jury could have found that decedent's death resulted in whole or in part from the defective appliance and that it was error to direct a verdict for the railroad. The Supreme Court, referring to the State Court's discussion of distinctions between "proximate cause" in the legal sense and "cause" in the philosophical sense, simply noted that the language of the statute, i.e., "resulting in whole or in part", was clear and direct and that consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose.

In *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500 (1957) the Supreme Court was again dealing with an evidentiary situation in which the Missouri Supreme Couurt had reversed a jury award to plantiff in a F.E.L.A. case. The Supreme Court granted certiorari and reversed the State Supreme Court upon the ground that the evidence was sufficient to support the jury finding for plaintiff, pointing out that under F.E.L.A. the test of a jury case is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury, citing *Coray v. Southern Pacific, supra.**

In *Bertrand v. Southern Pacific,* 282 F.2d 569 (9th Cir. 1960), a F.E.L.A. case in which plaintiff appealed after an adverse jury verdict, one of the questions on appeal was whether the trial judge had erred in failing to give plaintiff's requested jury instruction to the effect that the language of *Rogers,* i.e., "played any part, even in the slightest, in producing the injury" constituted a "test of the liability of the railroad carrier". The court, affirming, very properly pointed out that *Rogers, supra,* was concerned, not with a "test of liability," but only with a "test of a jury case" and held the proposed instruction faulty in that it

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* See, Dissenting opinions of Frankfurter (352 U.S. 524) and Harlan (352 U.S. 559) which emphasize that Rogers, and similar cases, involved mere evidentiary review and state that (in the opinion of the dissenters) they should never have been taken up by the Supreme Court.

bound the jury to find what it was entitled to find but was not required to find.

Neither *Coray* nor *Rogers, supra,* purports to define causality other than to point out that, according to the plain and direct language of the statute, the negligence of the railroad need not be either the sole or the whole cause of the employee's injury so long as it plays some part, however small, in producing the injury.

These authorities do not necessarily make it error for a trial judge to instruct, or at least attempt to instruct, a jury on the meaning of the statutory requirement that the injury must be one "resulting in whole or in part from" the negligence of the railroad. (See, *Rogers, supra,* pp. 504-505).

Certainly, the statutory requirement that the injury must have *resulted from* negligence necessarily implies that the injury must have been *caused by* the negligence. The words "cause" and "result" are correlative terms, each implying the other. The word result, used as a verb, means "to happen or issue as a consequence or effect of some cause". The word "cause" means "that which produces an effect or result, that from which anything proceeds and without which it would not exist." (See, Webster Unabridged Dictionary).

In the instruction here in question the trial court, attempting to further explain the causation required

by the statute, told the jury in part that the cause must be a proximate cause, i.e., a "cause which in a direct, unbroken sequence produces the injury and without which the injury would not have occurred."

The first question is whether *Coray* and *Rogers* render this instruction erroneous in a F.E.L.A. case. We do not think so.

Both *Coray* and *Rogers* recognize, as this instruction substantially states, that the negligence of the railroad must "contribute" (Coray) at least in part to the injury and that the negligence must "play a part" (Rogers) even though the very slightest in producing the injury.

The instruction in question merely adds that the cause of the injury must produce the injury in a "direct, unbroken sequence". We see nothing erroneous in this. Certainly, if the sequence of events between the negligence, on the one hand, and the injury on the other, is broken, then the claimed cause, i.e., the negligence, would not really be a cause at all—nor the injury a "result" of it.

The instruction in question also adds that the cause must be one "without which the injury would not have occurred". We see nothing erroneous in this. Certainly, if the claimed result, i.e., the injury, would have occurred in any event, even without the negligence of the railroad, then the injury would not

really be the "result" of the negligence, nor the negligence the cause of it.

The only possible criticism of the questioned instruction is that, if given alone, it might be misleading to the jury in that it might suggest that the negligence of the railroad would have to be the sole and the whole causative factor producing the injury.

In the pending case, however, the questioned instruction was not given alone. It was coupled with other language (precisely the language of *Rogers*) clearly indicating that, if the negligent act or omission of the railroad "played any part, no matter how small, in bringing about or actually causing the injury", then it would be a proximate cause within the meaning of the court's instructions.

The instructions here, considered as a whole, are not comparable to those quoted and condemned in *Page v. St. Louis Ry. Co.*, 312 F.2d 84 at p. 87 (5th Cir. 1963) in which a traditional proximate cause instruction was given *without* adding the language of *Coray* or *Rogers* and without attempting in any other way to indicate to the jury that the negligence of the raolroad need not be the sole or the whole cause of resulting injury.

Moreover, the court in *Page* made clear (p. 92) that it was "not making any wholesale condemnation of the use of language of proximate causation in

cases under this act", adding, "our holding is confined to the instructions and the facts of this particular case".

Although not cited in the briefs, we have also noted the very recent and carefully considered opinion in *Parker v. A. T. & S. F. Ry.*, 68 Cal. Rptr., Court of Appeal, Second District (Hufstedler, J. (May 10, 1968), reversing a F.E.L.A. judgment for the railroad (after jury verdict) upon the ground that the trial court prejudicially erred in giving the traditional proximate cause instruction *without* anything more *except* a statement of the substance of 45 U.S.C. §51.

The instructions in *Parker,* however, like the instructions in *Page,* are not comparable with the instructions given in our pending case. In both *Page* and *Parker* the trial judge gave the traditional proximate cause instruction. The *Parker* instructions differ from *Page* only in that the trial judge in *Parker* added a paraphrase of Title 45 U.S.C. §51 in which the statutory words "resulting in whole or in part" appear. In neither case, however, did the trial judge add anything to adequately convey the meaning of causation as articulated by *Rogers* to the effect that the negligence of the railroad need not be the sole cause or the whole cause of injury.

Parker recognizes that the giving of a traditional proximate cause insruction in a F.E.L.A. case is not

necessarily reversible error. The point in *Parker* was that the plaintiff is entitled to an instruction on causation which connotes the controlling spirit of *Rogers*. The court regarded the traditional proximate cause instruction there given* as falling substantially short of conveying the *Rogers* message. The court noted that the mere addition of a paraphrase of Section 51 did not adequately convey the meaning of *Rogers* because, as the court said, "The words 'or in part' are submerged in a barrage of detailed prose, and to assume that the jury would have grasped the significance of those three words and should have farther recognized that the words were an explanation of proximate cause as expressed in B.A.J.I. No. 104 attributed unreasonable powers of perception to the jury".

Our pending case is quite different in that the trial judge, although giving a sparse version of the traditional proximate cause instruction as an abstract definition of causation, followed it with specific, formula instructions in which the language, message and spirit of *Rogers* were stated and reiterated in three separate phrasings—so clearly and emphatically that the jury could not have missed the message.

The trial court took the added precaution of reminding the jurors that "You are not to single out one instruction alone as stating the law but must consider the instructions as a whole".

We conclude that the instructions, as here framed for the jury, could not possibly have led the jurors to believe that the negligence of the railroad, in order to result in or cause the employee's injury, would have to be the sole cause or the whole cause.

However, just as in *Page* and *Parker*, so we in this case neither make any wholesale condemnation of the use of a traditional proximate cause instruction in F.E.L.A. cases nor do we necessarily recommend instructions in the particular form here given. We confine our holding to the particular instructions of this case and hold that, considered as a whole, they were neither erroneous, self contradictory nor misleading and that, even if in part erroneous, they were as a whole not prejudicially misleading.

The judgment is, therefore, affirmed.

• B.A.J.I. No. 104.

SUPREME COURT, U. S.

JAN 14 1969

IN THE

Supreme Court of the United States

October Term, 1968

No. 850

ROBERT C. FORSETH,
Petitioner,

v.

GREAT NORTHERN RAILWAY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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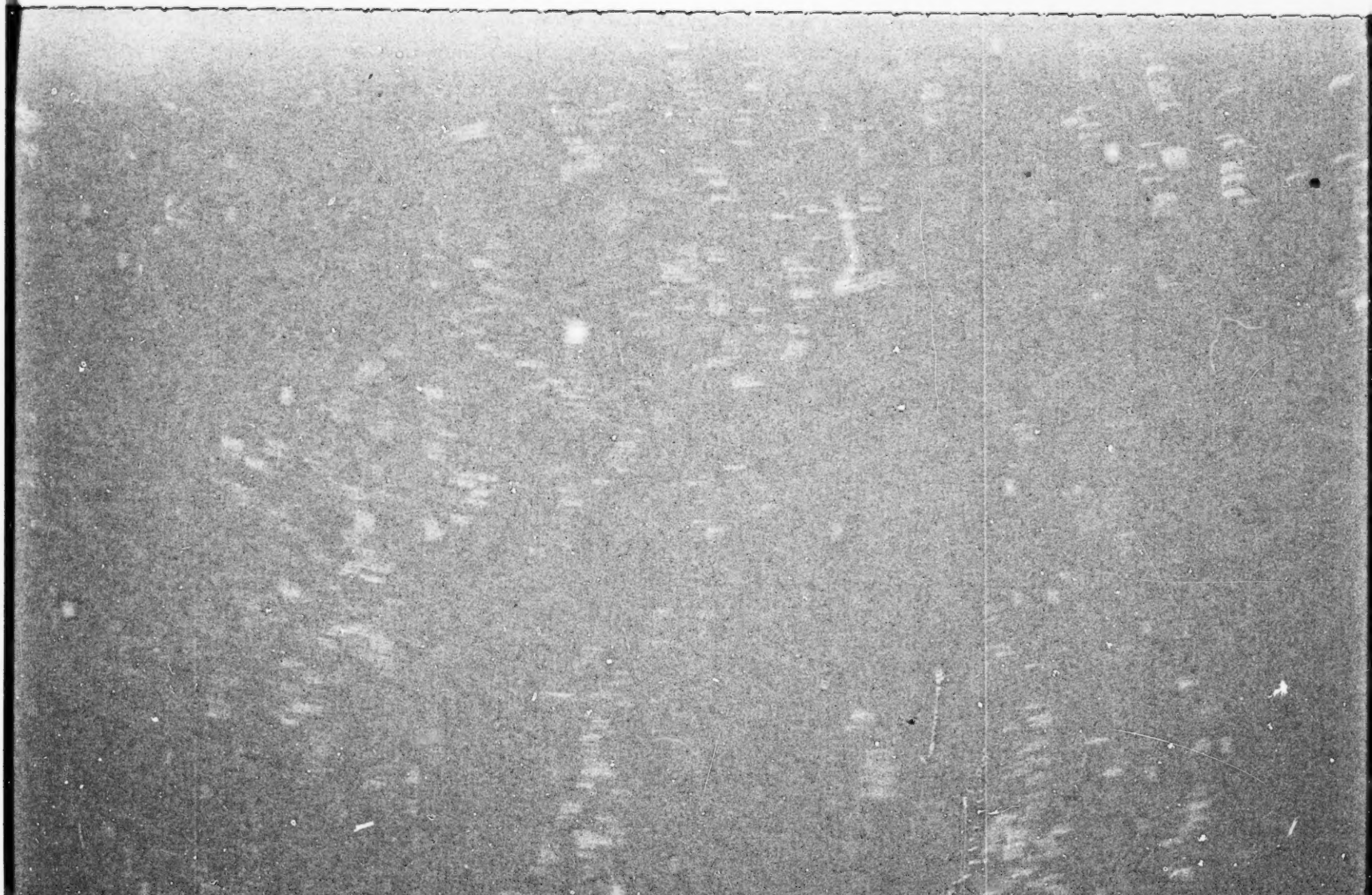

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STATEMENT OF THE CASE

On February 7, 1966, Robert G. Funseth, petitioner, was employed as a brakeman by respondent Great Northern Railway Company and claims to have injured his back operating a switch at Hillyard yard, Spokane, Washington. Petitioner Funseth testified that the switch stuck and that he was required to and did exert unusual force and power to line it. Witnesses for respondent testified that the switch operated normally at the time and place of the incident and that it had been regularly and properly maintained and serviced.

Subsequently petitioner was treated for low back pain which later necessitated surgery and fusion.

QUESTION PRESENTED

Did the trial court err in defining the necessary causal relationship between respondent's alleged negligence and petitioner's injury in the following manner?

> "A party is not entitled to recover solely because there has been an accident. Any party claiming negligence or contributory negligence has the burden of proving by a preponderance of the evidence, that the other party was negligent in some one of the particulars claimed, and that such negligence was a proximate cause of the injury and damage to plaintiff claimed.
>
> "The term 'proximate cause' means that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened.
>
> "An injury or damage is proximately cause (sic) by an act, or failure to act, whenever it appears from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about, or actually causing, the injury or damage. So, if you should find, from the evidence in the case that any negligence of the defendant contributed in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission.
>
> "The primary inquiry for you to decide in this case is whether you draw the conclusion that negligence of the railroad employer played any part in bringing about the injury to plaintiff. If you find that any carelessness or negligence on the part of the railroad, or of any employee of the railroad other than the plaintiff, in any way caused or contributed even in the slightest degree to the injury or injuries complained of, then your verdict should be for the plaintiff. Similarly, if you should find, from the evidence in the case that any negligence of the plaintiff contributed in any way or manner toward any injury

or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the plaintiff's act or omission, and plaintiff's recovery will be reduced accordingly as hereinafter explained." (Clerk's Tr. 109-110)

SUMMARY OF ARGUMENT

The instructions given on causation correctly defined the necessary connection between respondent's negligence and petitioner's injury and at the same time fully informed the jury that the respondent's negligence need not be the only cause in order to produce liability and that if employer negligence played any part in producing the injury, however slight, that such injury was proximately caused by such negligence.

ARGUMENT

Contrary to petitioner's assertion, the trial court did not define causation in terms of the so-called "common law standard of proximate cause." The instructions given defining causal relationship were carefully drawn by the trial judge to reflect the two essential principles of causation under the Federal Employers' Liability Act.

First — That the employer's negligence, if any, must be a cause of the injury or damage, and

Second — That if the employer negligence caused the injury or damage in whole or in part, even the slightest, then the jury may find such negligence was a proximate cause of the injury or damage and make an award to the plaintiff.

A reading of the instructions given will indicate that the second principle received heavy emphasis while the principle requiring causal connection was covered only

once briefly. The court first instructed that to be actionable an injury must result from the negligence of some party and such negligence must proximately cause such injury. The court then defined proximate causation. In order to be doubly certain that the jury understood the limited employer involvement necessary to sustain an award, the court then instructed:

> "An injury or damage is proximately caused by an act or failure to act, whenever it appears, from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find, from the evidence in the case, that any negligence of the defendant contributed, in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission."

Then, in order to be absolutely certain that the jury understood the concept that it could make an award even though employer negligence made only a minor contribution to cause the accident, the court further instructed:

> "The primary inquiry for you to decide in this case is whether you draw the conclusion that negligence of the railroad employer played any part in bringing about the injury to plaintiff. If you find that any carelessness or negligence on the part of the railroad, or of any employee of the railroad other than the plaintiff, in any way caused or contributed even in the slightest degree to the injury or injuries complained of, then your verdict should be for the plaintiff. Similarly, if you should find, from the evidence in the case that any negligence of the plaintiff contributed in any way or manner toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the plaintiff's act or omission, and plaintiff's recovery will be reduced accordingly as hereinafter explained." (Clerk's Tr. p. 109-110)

The Circuit Court Decisions Interpreting the Rule of Causation in F.E.L.A. Cases Are Harmonious

Instructions defining causation in F.E.L.A. cases have recently been reviewed by a number of circuit courts as well as by several state supreme courts. Contrary to petitioner's assertion, no conflict in the circuits has arisen and the definitions followed have been entirely harmonious.

In a few cases error has been found where the trial court gave a traditional definition of proximate cause without adequately incorporating the F.E.L.A. concept that employer negligence need only be a partial cause to support an award. *Page v. St. Louis Southwestern Railway Company,* 312 F.2d 84 (5th Cir. 1963); *Hausrath v. New York Central Railroad Company,* 401 F.2d 634 (6th Cir. 1968); *De Lima v. Trinidad Corporation,* 302 F.2d 585 (2nd Cir. 1962); *Hoyt v. Central Railroad,* 243 F.2d 840 (3rd Cir. 1957); *Parker v. Atchison, Topeka & Santa Fe Railway Company,* 58 Cal. Rptr. 362 (Cal. App. 1968).

The circuit courts have consistently approved the so-called Mathes and Devitt[1] instruction, given in this case at Clerk's Tr. p. 110, ll. 5 to 14. *Rogers v. Missouri Pacific Railway Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957); *Tyree v. New York Central R. R. Co.,* 382

1. "An injury or damage is proximately caused by an act or failure to act, whenever it appears, from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find, from the evidence in the case, that any negligence of the defendant contributed, in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission." Mathes and Devitt, *Federal Jury Practice and Instructions,* Sec. 84.12 (1965).

F.2d 524 (6th Cir. 1967), cert. den. 389 U.S. 1014, 88 S.Ct. 589, 19 L.Ed.2d 659 (1967). This instruction combines a definition of causation with the concept that employer negligence need only be a partial or contributory cause to support an award. It should be noted here that the trial judge in this case went far beyond simply giving the Mathes and Devitt instruction and in conclusion advised the jury that "the primary inquiry for you to decide in this case is whether you draw the conclusion that negligence of the railroad employer played any part in bringing about the injury to plaintiff. If you find that any carelessness or negligence on the part of the railroad or any employee of the railroad other than the plaintiff in any way caused or contributed, even in the slightest degree, to the injury or injuries complained of, then your verdict should be for the plaintiff." (Clerk's Tr. p. 110, ll. 15-23)

Other instructions have been approved where the trial judge declined to give the Mathes and Devitt instruction but rather gave an acceptable definition of proximate cause blended with the concept that employer negligence, if any, need not be the sole cause so long as it is an actual, contributing, proximate cause. *Iannacito v. Denver & Rio Grande Western Railroad,* 380 F.2d 1019 (10th Cir. 1967); *Ganotis v. New York Central Railroad Company,* 342 F.2d 767 (6th Cir. 1965); *Olsen v. States Line,* 378 F.2d 217 (9th Cir. 1967); *Morrison v. New York Central Railroad Company,* 361 F.2d 319 (6th Cir. 1966).

Coray v. Southern Pacific Co., 335 U.S. 520 (1948) and *Rogers v. Missouri Pacific Railway Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), relied on by peti-

tioner, do not lend support to the petition for certiorari. The circuit court here correctly points out at Appendix to Petition for Writ of Certiorari page 23, that *Coray* and *Rogers* hold that the negligence of the employer must contribute (*Coray*) at least in part to the injury and that the negligence must "play a part (*Rogers*) even though the very slightest in producing the injury." Both *Coray* and *Rogers* recognize the statutory requirement that employer negligence must play some part in producing the injury to sustain an award. The causation instructions requested and given by the Funseth trial court correctly indicate that the employer negligence necessary to support an award must be at least a partial cause of the injury and must have some role in producing the injury and without which such injury would not have happened.

CONCLUSION

Petitioner asserts that the trial and circuit courts erred in giving common law proximate cause instructions in an F.E.L.A. case. A careful reading of the instructions given, as shown by the analysis of those instructions by the Ninth Circuit Court of Appeals, establishes conclusively that the instructions given accurately reflected F.E.L.A. principles and were not limited to "common law proximate cause" as claimed.

The petition for certiorari should be denied.

Respectfully submitted,

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